Supreme Court, U. S.
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No. 80-107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

THE MENOMINEE TRIBE, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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July 24, 1980

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QUESTION PRESENTED

Whether the provision of the federal court rule* that allows relation back of a claim asserted in an amended pleading, precludes the dismissal of a claim for a constitutional taking, where:

1) the original, timely filed petition generally presents a claim for a taking under a federal statute;

2) an amended petition, filed after trial by leave of court, further defines the claim to specify a particular taking under that same statute.

PARTIES TO THE PROCEEDING

The plaintiffs in this action are the Menominee Tribe of Indians, a federally recognized Indian tribe,† Menominee Enterprises, Inc. ("MEI"), a Wisconsin corporation created when the Tribe was terminated to own and control the assets of the Tribe formerly held in trust by the United States,** First Wisconsin Trust Company, as

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*Court of Claims Rule 39(c); Rule 15(c) of the Federal Rules of Civil Procedure.

†The Menominee Tribe's federally protected status was terminated by the United States on April 21, 1961, and was restored on December 22, 1973. Such termination did not affect the status of the Tribe as a legal entity capable of bringing suit under 28 U.S.C. § 1505. *See Menominee Tribe v. United States,* 221 Ct. Cl. ___, ___, 607 F.2d 1335, 1338 n.1 (1979), *cert. denied,* 48 U.S.L.W. 3626 (1980). The Tribe was restored to federally recognized status by the Menominee Restoration Act of 1973, 25 U.S.C. §§ 903–903b (1976).

**When the Tribe was restored to federally recognized status, the majority of the assets were transferred either directly to the Tribe or to the United States in trust for the Tribe. Nonetheless, MEI continues to exist as a Wisconsin corporation, and remains a plaintiff in this action.

trustee for those enrolled members of the Menominee Tribe who are minors, *non compos mentis,* or otherwise incompetent, and Gordon Dickie, Jerry Grignon and George Kenote, three individuals who are enrolled members of the Menominee Tribe and stockholders of MEI, suing as a class.

The defendant is the United States of America.

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No.

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Petitioners,

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

On March 21, 1980, a panel of the Court of Claims[1] issued an order granting the defendant United States' motion for summary judgment and dismissing plaintiffs' claim for loss of its treaty guaranteed federal and state tax exemption on the ground that the claim was barred by the statute of limitations. A copy of this Order is reprinted as Appendix A. Plaintiffs' timely motion for rehearing and suggestion for rehearing *en banc* was denied on April 25, 1980. A copy of that Order is reprinted as Appendix B.

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[1]The case was decided by only two judges, Judge Davis and Judge Nichols.

JURISDICTION

The judgment of the Court of Claims was entered on March 21, 1980. A timely petition for rehearing *en banc* was denied on April 25, 1980, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1) (1976).

AUTHORITIES INVOLVED

The Menominee Termination Act, 68 Stat. 250 (1954), *as amended,* 25 U.S.C.A. §§ 891-902 (1963) (repealed by Pub. L. No. 93-197, 87 Stat. 770 (1973), 25 U.S.C. § 903 (1976)). A copy of the Termination Act is reprinted as Appendix C.

United States Code, Title 28:

§ 2501. Time for Filing Suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Federal Rules of Civil Procedure:

Rule 15(c). Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . .

Court of Claims Rule:

Rule 39(c). Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

STATEMENT OF THE CASE

On April 25, 1967, plaintiffs, the Menominee Tribe of Indians, *et al.*, brought suit in the Court of Claims for damages the Tribe suffered as a result of the congressional termination of its federally protected status as an Indian tribe. Jurisdiction was asserted under 28 U.S.C. §§ 1491 and 1505 (1976).[2] Plaintiffs alleged that the United States owed a fiduciary duty to the Tribe and listed a number of instances in which the Termination Act and its implementation had breached

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[2]The Court of Claims, in an October 17, 1979 decision in this case, held that it lacked jurisdiction to consider nonconstitutional congressional breach of trust claims, and dismissed those claims which were based solely upon that theory. *Menominee Tribe v. United States*, 221 Ct. Cl. ___, ___, 607 F.2d 1335, 1340 (1979), *cert. denied*, 48 U.S.L.W. 3626 (1980). Plaintiffs' claim for damages for loss of its treaty guaranteed tax exemption, however, is based on a violation of the fifth amendment, and the court clearly had jurisdiction over it. 221 Ct. Cl. at ___, 607 F.2d at 1347. Indeed, in its March 21, 1980 Order dismissing the petition, the court specifically found that it would have jurisdiction to consider this claim were it not barred by the statute of limitations. *See* App. A at 2a.

that duty.[3] Plaintiffs also alleged that the Act and its implementation resulted in a taking of their property without compensation in violation of the fifth amendment.[4] The petition specifically cited the Termination Act numerous times, and concluded with a general request for damages resulting from termination:

> WHEREFORE, plaintiffs pray that judgment be entered against the defendant in an amount which will provide just compensation under the Fifth Amendment to the Constitution and other applicable laws, including damages for delay in payment, for plaintiffs' property and interests in property taken or disposed of by the defendant; and for damages incurred by plaintiffs due to defendant's negligence hereinbefore set out and for defendant's mismanagement of plaintiffs' funds and property; and for such other and further relief as to the Court may appear just and equitable.[5]

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[3] *See* paragraphs 6-13 of the petition, App. D at 21a-26a. Paragraph 6 of the petition sought compensation for the deed restrictions imposed upon the Menominee Forest upon termination, paragraph 8 sought to recover expenditures relating to the tribal sawmill that plaintiffs were forced to incur as a result of termination, paragraph 9 sought compensation for the highway rights-of-way through plaintiffs' property which defendant granted to third parties, paragraph 11 sought to recover expenditures relating to the public sewerage system that plaintiffs were forced to incur as a result of termination, and paragraph 13 sought recovery for the various expenses of the termination process which plaintiffs had been forced to bear.

[4] *Id.*, App. D at 29a-30a.

[5] *Id.*

To put the Court of Claims' dismissal of plaintiffs' claim for loss of tax exemption in its proper perspective, it is necessary to review briefly the circumstances surrounding the termination of federal supervision over the Menominees. The Menominee Indian Reservation was established by the Treaty of Wolf River in 1854. 10 Stat. 1064 (1854). Pursuant to the Treaty, title to the approximately 276,480-acre Reservation was held in trust by the United States for the benefit of the Tribe. 10 Stat. 1065. In 1954, after the Menominees had occupied their Reservation for a century, Congress passed the Menominee Termination Act. 68 Stat. 250 (1954), *as amended,* 25 U.S.C.A. §§ 891-902 (1963) (repealed by Pub. L. No. 93-197, 87 Stat. 770 (1973), 25 U.S.C. § 903 (1976)). The Menominees were vehemently opposed to termination, but Congress ignored their wishes and terminated federal supervision over the Tribe because it wished to reduce the operating expenses of the Bureau of Indian Affairs and to get the United States "out of the Indian business." *See Menominee Tribe v. United States,* 221 Ct. Cl. ___, ___ n.4, 607 F.2d 1335, 1339 n.4 (1979), *cert. denied,* 48 U.S.L.W. 3626 (1980). The Menominees, unsuccessful in preventing termination and believing it had been poorly conceived, badly implemented, and forced upon them despite the better judgment of almost everyone involved,[6] brought suit

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[6]After 12 years Congress admitted that termination was ill-conceived and a bitter failure, causing much hardship to the Tribe. In 1973, therefore, it restored federal protection to the Tribe. *See* Menominee Restoration Act, 25 U.S.C. § 903 (1976). Congressman Saylor, speaking in favor of the Act, decried the effect of the Termination Act:

> The bill before us, H.R. 10717, is not a panacea nor a permanent solution to the problems of the Menominee

[footnote continued]

in the Court of Claims to recover damages for the losses incurred as a result of the termination process and of the government's violation of its fiduciary obligations to the Tribe.

After extensive discovery, plaintiffs filed a pretrial statement in which they alleged, among other things, that termination had deprived the Tribe of its treaty-vested tax exemption in violation of the fifth amendment and claimed damages as a result of such taking.[7] Defendant's responding pretrial statement not only did not assert that plaintiffs' loss of tax exemption claim was time barred because it was not specifically pleaded, but indicated that defendant interpreted the original petition exceedingly broadly:

> The *petition* in this case makes a number of claims for damages with respect to the termination of Federal supervision over the Menominee Indians of Wisconsin and the events preceding that termination.[8]

In March of 1971, counsel for both parties executed a formal agreement listing plaintiffs' nine claims and the

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Tribe of Indians, *nor does it undo the human suffering and economic damage imposed on these people over the past 20 years.* It is not a perfect bill, Mr. Speaker, but it is a better bill than the monstrosity that was rammed through this House in 1954 as part of the mistaken "termination policy" of those times. [119 Cong. Rec. 34302 (1973), emphasis added.]

[7]Plaintiffs' Pretrial Statement, filed March 18, 1970, at 31, 50-52.

[8]Defendant's Pretrial Statement, filed November 17, 1970, at 1 (emphasis added). Defendant did not respond directly to the claim on the merits, but instead interposed a series of broad denials and general theories. *Id.* at 27-75.

dates they would be tried.[9] Plaintiffs' claim for damages resulting from the loss of its treaty tax exemption was scheduled for trial December 1-7, 1971, and was in fact tried at that time. Both parties submitted post-trial briefs, and although defendant vigorously contested liability for this claim on the merits, it at no point suggested that the claim was outside the scope of the original petition and thus time barred.[10]

After the post-trial briefs were submitted, the Trial Judge granted plaintiffs' motion to sever the case into its component claims, and plaintiffs moved, pursuant to Court of Claims Rule 39(b), for leave to amend their petition to conform to the evidence produced at trial. Defendant objected on a number of grounds, but again did not assert that the loss of tax exemption claim was time barred.[11] The Trial Judge, by order, granted plaintiffs' motion.[12] Plaintiffs then filed their second amended petition and defendant answered. In its answer, defendant for the first time asserted that plaintiffs' claim was barred by the statute of limitations, not because the claim did not relate back to the original petition, as it now alleges, but because the claim supposedly accrued

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[9]The Agreement was incorporated into the Trial Judge's March 16, 1971 Memorandum of Pretrial Conference, which is reprinted as Appendix E.

[10]*See* Defendant's Objections to Plaintiffs' Requested Findings of Fact and Conclusions of Law, filed May 1, 1973, at 553-559.

[11]*See* Response to the Motion of Plaintiffs to Amend the First Amended Petition, filed January 31, 1975, reprinted as Appendix F.

[12]Order on Plaintiffs' Motion for Leave to Amend the First Amended Petition (Rule 39(b)), filed February 18, 1975, reprinted as Appendix G.

more than six years before plaintiffs' original petition was filed. Defendant has since abandoned this claim.

On November 30, 1979, almost eight years after trial, defendant first asserted, by motion for summary judgment, that plaintiffs' claim for loss of tax exemption was barred because it was not specifically pleaded prior to the expiration of the statute of limitations period. By Order of March 21, 1980, a panel of the Court of Claims granted defendant's motion and dismissed the instant claim. Although it was undisputed that defendant had actual notice of the claim and defended against it on the merits, the panel ignored this fact and dismissed the claim, ostensibly because defendant had not been given *formal* notice of the claim prior to the expiration of the limitations period.

The panel first observed that because the limitations period expired five days subsequent to the filing of plaintiffs' original petition, defendant must have been given formal notice of the claim within that time in order for the claim not to be barred by the statute of limitations. Order of March 21, 1980, App. A at 3a. Noting that there was nothing in the record which indicated such notice, the panel concluded that the original petition was the only document which could give timely notification. *Id.* After briefly analyzing the petition, the panel concluded that the complaint set forth nine specific wrongs, none of which were an uncompensated taking of the Tribe's tax exemption. *Id.* at 3a-4a. Notwithstanding the fact that all of plaintiffs' claims arose out of termination and the Termination Act, and were premised on two legal theories, breach of trust and inverse condemnation, the panel concluded that the claims had no nexus or common legal

theory.[13] Postulating that the "relation back" doctrine and Rule 39(c) required "some reference in the original pleading, however hazy, to the conduct later complained of," the panel concluded that because Section 9 of the Termination Act was not *specifically* mentioned in the original petition, the claim could not relate back. *Id.* at 5a.

The panel also found that Rule 39(b) was not applicable because it incorrectly concluded that no trial on the loss of the tax exemption claim had been held. *Id.* at 5a-6a. Plaintiffs accordingly filed a motion for rehearing *en banc*, pointing out that trial had indeed been held on this issue, and a motion under Rule 39(b) to amend the pleadings had been made and granted by the Trial Judge over the express objections of defendant.[14] The panel, however, denied plaintiffs' motion for rehearing on the ground that rules such as 39(b) could not be construed to enlarge the court's jurisdiction to include a case otherwise barred by the statute of limitations. Order of April 25, 1980, App. B at 8a.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the scope of the federal court rule that allows the relation back of amendments to pleadings, in the interests of justice, when the claim involved "arose out of the conduct, transaction, or occurrence set forth or attempted

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[13]Order of March 21, 1980, App. A at 4a. The court also found that the petition contained no catch-all or basket clause other than the concluding "Wherefore" clause, which it interpreted as referring only to the nine specific wrongs. *Id.* This conclusion is also erroneous.

[14]Defendant took no appeal from this Order.

to be set forth in the original pleading . . . ."[15] The Court of Claims in the instant case dismissed plaintiffs' claim out of an apparent belief that application of the relation-back doctrine would be an impermissible use of a court rule to enlarge the court's jurisdiction to include a claim otherwise excluded by the provisions of 28 U.S.C. § 2501.[16]

In point of fact, no enlargement of the court's jurisdiction is involved. The jurisdiction of the court was clearly and properly invoked by the filing of the original petition. Plaintiffs there not only asserted a general claim of a constitutional taking, but specifically cited the Menominee Termination Act in its entirety at several points in the petition.[17] That the government received

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[15]Court of Claims Rule 39(c); Rule 15(c) of the Federal Rules of Civil Procedure. The two rules, in pertinent part, are identical, and the Court of Claims has consistently maintained that its rule is to be interpreted precisely the same as the federal rule. *See, e.g., Vann v. United States,* 190 Ct. Cl. 546, 557, 420 F.2d 968, 974 (1970).

[16]*See* Order of April 25, 1980, App. B at 8a.

[17]Both parties and the Court of Claims have consistently recognized throughout the long history of this litigation that this case arose out of the termination of the Menominee Tribe. Defendant, in its pretrial statement, characterized the action as a series of "claims for damages with respect to the termination of Federal supervision over the Menominee Indians" (Defendant's Pretrial Statement Statement at 1). And the Court of Claims, in an *en banc* decision applicable to all the claims discussing the question of whether the United States breached its fiduciary duty to the Tribe in terminating it, described the case as "arising out of the Menominee Termination Act" and stated:

> The essential charge is that the passage and implementation of the Act was a breach of the trust owed by the United States to the Menominees, *and in some instances a violation of the Just Compensation Clause of the Fifth Amendment.*

221 Ct. Cl. at ___, ___, 607 F.2d at 1335, 1338 (emphasis added).

adequate notice of the claim is shown by the fact that it raised no objection to the actual trial, in 1971, of the specific claim for the taking of plaintiffs' treaty-vested tax exemption by Section 9 of the Termination Act. In filing an amended petition, with leave of the court, the plaintiffs were only further defining the general claim originally pleaded well within the statutory time bar.

The Court of Claims' decision that plaintiffs' loss of tax exemption claim must be dismissed, because a claim for a taking under Section 9 of the Termination Act was not more specifically pleaded in the original complaint, offends the fundamental goal of the Federal Rules that claims be resolved on their merits rather than dismissed because of procedural technicalities. It also conflicts with a line of cases in other federal courts which have allowed similar amended pleadings to relate back to the filing of an original complaint, even where relation back of the amended pleading had the result of avoiding an otherwise jurisdictional time bar.

This Court should grant certiorari both to resolve the conflict presented and, in the exercise of its supervisory powers over the federal courts, to assure appropriate administration of the important federal court rule involved.

A. The Court of Claims' Dismissal of Plaintiffs' Claim Contradicts the Intent of the Federal Rules.

The role of the Federal Rules in the judicial process is defined in Rule 1, which states that the Rules are to be interpreted "to secure the just, speedy, and inexpensive determination of every action." The Rules are to be liberally construed to do substantial justice, and to reach the merits of the controversy whenever possible by

avoiding decisions based upon procedural technicalities. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332, 336 (D.C. Ga. 1975); *Markham v. Holt*, 369 F.2d 940, 943 (5th Cir. 1966). As the Court emphasized:

> Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end . . . . Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. [*Maty v. Grasselli Co.*, 303 U.S. 197, 200-201 (1938).]

Rule 15(c) and Rule 39(c), which embody the relation-back doctrine, are important pleading rules designed to insure that justice is not defeated by procedural technicalities. *Id.* The Court of Claims' dismissal of plaintiffs' loss of tax exemption claim, after the issue had been fully tried and briefed on the merits and in the absence of any prejudice whatsoever to the defendant, is precisely the result these rules were designed to avoid. As this Court has stated:

> There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it . . . . [*Tiller v. Atlantic Coast Line*, 323 U.S. 574, 581 (1945).]

The defendant knew throughout the course of this litigation that the Menominees' claim was for damages arising out of the termination of federal supervision, and the panel's deliberate attempt to ignore this fact and focus instead on the narrow question of whether Section 9 of the Termination Act was specifically pleaded in the original complaint destroys the very purpose of the Rule.

B. The Court of Claims Was in Error When It Determined That the Application of the Relation-Back Doctrine Would Enlarge the Jurisdiction of the Court of Claims.

The Court of Claims dismissed plaintiffs' claim because it believed that application of the relation-back doctrine would have expanded the jurisdiction of the court, in violation of the principle that court rules may not be used to expand jurisdiction. The court's understanding of the relation-back doctrine is faulty, however, for proper application of the doctrine does not expand the jurisdiction of the court. The language of the rules setting forth the doctrine provide that a claim may relate back to the original petition whenever it arose out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." When the original petition is timely pleaded, the court has jurisdiction over all claims which arose out of the conduct, transaction or occurrence set forth in that document. Application of the relation-back doctrine, therefore, does not expand the jurisdiction of the court, but only makes explicit a claim which existed but was not specifically pleaded in the original petition.

C. The Court of Claims' Opinion That the Application of the Relation-Back Doctrine in This Case Would Expand the Jurisdiction of the Court Conflicts with the Opinions of the Federal Courts of Appeals.

The federal district courts of appeals have applied the relation-back doctrine in cases in which the United States was the defendant, and the statute of limitations therefore jurisdictional, and have uniformly allowed an amendment to relate back when it arose out of the

"conduct, transaction, or occurrence" which was set forth in the original complaint. In *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968), for example, the plaintiff sued the United States under the Federal Tort Claims Act, which had a two-year statute of limitations.[18] In the original complaint, the mother, as guardian for the minor child, sought damages for injuries sustained by the child from an explosion. Five years later, the mother sought leave to amend the complaint to become a plaintiff in her own right and to recover damages for loss of services, a claim allowed parents under Georgia state law. 405 F.2d at 235.

Although the amended petition set forth a new plaintiff and a new cause of action, the court did not believe that it lacked jurisdiction to consider it. Rather, the court determined that notice was the critical element, and held that as long as the amended complaint referred to the transaction which formed the basis of the original complaint and the defendant was put on notice of the claim by the first complaint, the amendment would relate back. 405 F.2d at 237.

> The doctrine of relation back under Rule 15(c) is "based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced." *Williams v. United States*, 405 F.2d

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[18] *See* 28 U.S.C. § 2401(b) (1976) which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

> at 236 (5th Cir. 1968), *citing* 3 Moore, Federal Practice ¶ 15.15[2] at 1021.

Finding that the complaint, read liberally, revealed the existence of a minor, the mother as parent, and the assertion by her of a claim, the court held that since liability to the minor would give rise to liability to the parent under local law, and since the circumstances of the individuals was such as would reasonably indicate a likelihood that the parent would incur losses of a recoverable kind, the government was put on notice that the parent's claim was also involved. 405 F.2d at 239.

Similarly, the fact that the statute of limitations under the Federal Tort Claims Act is jurisdictional did not prevent the court in *United States v. Johnson,* 288 F.2d 40 (5th Cir. 1961), from allowing an amendment to relate back. In the original petition in that case, the plaintiffs alleged that crashes of aircraft in plain view of their home aggravated the heart condition of Mrs. Johnson, and sought damages as a result of the government's failure to condemn plaintiff's property as it had promised. 288 F.2d at 41-42. The amended complaint listed seven specific crashes, and alleged that defendant was negligent in allowing the planes to crash. 288 F.2d at 41. The court allowed the amendment to relate back because

> when a suit is filed under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement. [288 F.2d at 42 (citation eliminated).]

Because the amendment stated a claim arising out of the transaction originally pleaded (the airplane crashes around plaintiffs' home), defendant was put on notice,

and there was no reason to employ the statute of limitations. *Id.*

The Court of Claims' interpretation of the relation-back doctrine in the present case is completely contrary to the analysis employed by these federal courts. The termination of the Menominee Tribe by the Termination Act of 1954 was the occurrence which gave rise to both plaintiffs' original petition as well as the amendment, and the original petition, which cited the entire Act, gave defendant ample notice that the Menominees were asserting claims arising out of termination. Under the analysis employed by the other federal courts, plaintiffs' amendment would have related back.

CONCLUSION

The Court of Claims' decision that plaintiffs' loss of tax exemption claim cannot relate back because Section 9 of the Termination Act was not specifically pleaded in the original complaint is contrary to the fundamental goal of the Federal Rules that issues be resolved on their merits rather than dismissed because of procedural technicalities. It is also contrary to the federal circuit courts' interpretation of Rule 15(c) and the relation-back doctrine. Those courts have allowed amendments to relate back in the face of jurisdictional statutes of limitations if the amendment arose out of the general fact situation which was pleaded in the original complaint and if defendant had sufficient notice to adequately defend against the claim on the merits. In this case, it was clear from the beginning to all of the parties and the Court of Claims that the basic transaction underlying all of plaintiffs' claims was the termination of federal supervision over the Tribe. Plaintiffs' claim for damages for the loss of its tax exemption was no surprise to

defendant, who defended ably on the merits. Allowing plaintiffs' amendment to relate back does not expand the jurisdiction of the court, but simply delineates specifically one of the termination claims encompassed by the original petition.

If the Court of Claims' analysis that each separate section of the Act must be individually pleaded in the original petition in order for a claim under that section to relate back is allowed to stand, then the relation-back doctrine will be limited to correcting minor pleading errors in claims which were specifically pleaded in the original petition.[19]

The Court of Claims' decision is thus clearly erroneous, and creates a precedent which is contrary to all other federal court decisions. This Court should exercise its supervisory powers over the Court of Claims and grant the writ of certiorari to reverse the decision of the Court of Claims.

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[19]As Section 9 of the Termination Act dealt exclusively with the elimination of the Menominees' tax exemption, it would have been impossible to have specifically delineated Section 9 of the Act without specifically pleading the loss of tax exemption claim.

Respectfully submitted,

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July 24, 1980

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF CLAIMS

No. 134-67F

[Mar. 21, 1980]

THE MENOMINEE TRIBE OF INDIANS, *et al.*,

v.

THE UNITED STATES

LIMITATIONS, STATUTE OF, 28 U.S.C. § 2501, BARS SUIT ON CLAIM NOT STATED UNTIL SIX YEARS HAVE RUN AFTER ACCRUAL.

Angelo A. Iadarola, attorney of record for plaintiffs. *Wilkinson, Cragun & Barker,* of counsel.

Glen R. Goodsell, with whom was *Assistant Attorney General James W. Moorman,* for defendant.

Before DAVIS, *Judge,* Presiding, and NICHOLS, *Judge.*

ORDER

Defendant's motion for summary judgment calls on us to decide but a single issue, whether our 6-year statute of limitations, 28 U.S.C. § 2501, bars the Menominee's claim for exposure of themselves, their tribe, and their enterprises to Federal and State taxation by termination of their previous exemption.

This grievance is first pleaded in the amended petition filed February 20, 1975. The 1975 pleader relies wholly on the congressional enactment, Section 9 of the Menominee Termination Act, 28 U.S.C. § 899, as the Act for which defendant should be held liable, and he pleads alternatively a breach of fiduciary duty by the Congress, and a fifth amendment taking of property without payment of just compensation. The former theory is now out of court by reason of our decision, *Menominee Tribe of Indians v. United States,* ___ Ct. Cl. ___, 607 F.2d 1335 (1979), which holds that Congress has not consented to suit in this court based on alleged breaches of trust in enactments by Congress itself in its management of Indian affairs. This decision refers, however, to the instant claim as one of those into which the original single Menominee petition was severed in 1973. We specify that we address only nonconstitutional breach of trust claims, and leave open constitutional taking claims, which come under our Tucker Act and 28 U.S.C. § 1505 jurisdiction as founded on the Constitution. The instant claim can, therefore, now be prosecuted only on the taking theory, and our analysis of the motion must focus on when the plaintiffs first pleaded the loss of tax exemption as a grievance, and when they first alleged that their taking theory was applicable to this grievance.

It is undisputed that the Menominee Termination Act became effective April 30, 1961, and that this was the date the cause of action, if any, accrued. The plaintiffs filed their original petition April 25, 1967. As of that date, they had 5 days left to notify defendant of their tax exemption claim, unless that petition did so. There is no record of anything relevant said or done in those 5 days. Plaintiffs refer us to pretrial proceedings in 1970 and 1971, which, without opposition by defendant, dealt with the tax exemption claim under the fifth amendment as an active issue in the case, but these records say nothing about how long defendant had known of it. The formal amendment to state this claim was not until 1975, though clearly called for by the 1973 severance. Such is the way time passes in Indian claims litigation. We turn, therefore, to the original petition as the only document in the record that could reflect a timely notification to defendant that it must deal with, among others, the tax exemption claim. In this regard, defendant relies a little on the statement in fn. 2 of our 1979 *Menominee* decision, that the tax exemption claim was "added" after the original petition, but this was not written for the purpose of passing on the limitations issue, and is cited here out of context. We place no weight upon it.

The 1967 petition clearly sets forth in numbered paragraphs 6-14, nine specific wrongs, *e.g.*, 6. *Menominee Forest-Restrictions,* 7. *Menominee Forest-Management,* 8. *Menominee Mill.* All are specific problem areas in which defendant, according to the pleader, did the plaintiffs harm. Some, *e.g.*, 10. *Power Line Right of Way* deal with mismanagement before the termination date. In others, the Termination Act itself is the culprit, *e.g.*, 13. *Termination Expenses.* Tax exemption is

never mentioned. The pleader nowhere adds a catchall or basket clause to include other wrongs, if any. He repeatedly refers to negligence and breaches of trust. At the end of the petition, he adds:

> WHEREFORE, plaintiffs pray that judgment be entered against the defendant in an amount which will provide just compensation under the Fifth Amendment to the Constitution and other applicable laws, including damages for delay in payment, for plaintiffs' property and interests in property taken or disposed of by the defendant; and for damages incurred by plaintiffs due to defendant's negligence hereinabove set out and for defendant's mismanagement of plaintiffs' funds and property, and for such other and further relief as to the Court may appear just and equitable.

This can only be read as referring to the nine specific wrongs, and suggesting alternative legal theories under which damages might be assessed.

The original petition appears to set forth nine claims with no nexus except the identity of the plaintiffs and defendant. There was no common legal theory: claims might be proven as breach of trust or taking or negligence. Under some claims the major culprit was the Termination Act. Under others, it was negligence or mismanagement prior to the Act, impairing, perhaps, the value of the tribal property as turned over to tribal control on April 30, 1961. There is thus no grouping of claims that might be read as including claims not mentioned on some kind of *noscitur a sociis* theory. There is nothing that can fairly be read as a basket clause. The pleader does not seem to have entertained the idea that came into the case later, that every loss the Menominees suffered after 1961 might be imputed

to breach of trust in enactment of the Termination Act. Defendant's interpretation of the petition in 1970-71 might validate a construction of it that included the tax exemption claim, if the petition embodied any ambiguous language that could arguably have been meant to include that claim. It does not. Plaintiffs do not cite a single clause of the original petition except the WHEREFORE clause we have already quoted.

Plaintiffs rely on our Rule 39(c) which says that amendments to pleadings relate back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * *." As construed in *Vann v. United States,* 190 Ct. Cl. 546, 420 F.2d 968 (1970), some reference in the original pleading, however hazy, to the conduct later complained of is required, but Section 9 of the Termination Act, the specific grievance of the 1975 amended petition, is never mentioned in the original petition. None of the grievances mentioned in the original petition apparently rise out of Section 9, which section, following distribution of assets to the Indians, made them, and income derived therefrom, subject to State and Federal taxes the same as non-Indians' property and income.

Plaintiffs do not cite Rule 39(b) by which, when issues not raised by the pleadings are actually tried by express or implied consent of the parties, they shall be treated in all respects as if initially pleaded. We assume they concluded that entitlement to recover on the tax exemption claim would be a question of law, not requiring trial. The conclusion we reach does not require us to consider, and we do not decide, whether

the termination of a tax exemption is or can ever be a taking within the meaning of the fifth amendment.

Accordingly, upon review of the briefs and record, but without oral argument, defendant's motion for summary judgment is granted and the petition is dismissed.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

No. 134-67F

[April 25, 1980]

THE MENOMINEE TRIBE OF INDIANS, *et al.*

v.

THE UNITED STATES

RULES OF COURT CANNOT BE CONSTRUED TO ENLARGE STATUTORY JURISDICTION AS LIMITED BY 28 U.S.C. § 2501.

*Angelo A. Iadarola,** attorney of record for plaintiffs. *Wilkinson, Cragun & Barker* and *Jacquelyn R. Luke,* of counsel.

Glenn R. Goodsell, with whom was *Assistant Attorney General James W. Moorman,* for defendant.

Before DAVIS, *Judge,* Presiding, and NICHOLS, *Judge.*

*Mr. Iadarola was deceased at the time this order was entered and no substitution of attorney has been made.

ORDER

Following our order of March 21, 1980, which dismisses the petition, the plaintiffs have filed a motion for rehearing and suggestion for rehearing en banc. The gravamen of motion and suggestion is that plaintiffs never waived and always asserted their right under our Rule 39(b) to have their pleadings amended as of the original filing date to conform to evidence introduced without objection at trial. Without regard to whether there was a trial in the sense of the rule respecting the claim for deprivation of tax exemption, defendant says that in any case a rule of court such as Rule 39(b) cannot be construed to enlarge our jurisdiction to include a case from which 28 U.S.C. § 2501 excludes it. We agree. *Carney v. United States,* 199 Ct. Cl. 160, 462 F.2d 1142 (1972); *Rolls-Royce Ltd. v. United States,* 176 Ct. Cl. 694, 364 F.2d 415 (1966).

A majority of active judges of the court not having voted to rehear the case en banc, the suggestion to so rehear it must be denied.

The motion for rehearing is denied and the dismissal of the petition is affirmed.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

APPENDIX C

(25 U.S.C.A. §§ 891-902 (1963))

MENOMINEE TRIBE OF WISCONSIN: TERMINATION OF FEDERAL SUPERVISION

§ 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin. June 17, 1954, c. 303, § 1, 68 Stat. 250.

§ 892. Definitions

For the purposes of sections 891-902 of this title—

(a) "Tribe" means the Menominee Indian Tribe of Wisconsin;

(b) "Secretary" means the Secretary of the Interior. June 17, 1954, c. 303, § 2, 68 Stat. 250.

§ 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided,* That applicants for enrollment in the tribe shall have three months from the date the roll is closed in which to submit applications

for enrollment: *Provided further,* That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further,* That any applicant whose application is not approved by the tribe within six months from June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application, as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. June 17, 1954, c. 303, § 3, 68 Stat. 250.

§ 894. Per capita payments to tribal members

The Secretary is authorized and directed, as soon as practicable after June 17, 1954, to pay from such funds as are deposited to the credit of the tribe in the Treasury of the United States $1,500 to each member of the tribe on the rolls of the tribe on June 17, 1954. Any other person whose application for enrollment on the rolls of the tribe is subsequently approved, pursuant to the terms of section 893 of this title, shall, after enrollment, be

paid a like sum of $1,500: *Provided,* That such payments shall be made first from any funds on deposit in the Treasury of the United States to the credit of the Menominee Indian Tribe drawing interest at the rate of 5 per centum, and thereafter from the Menominee judgment fund, symbol 14X7142. June 17, 1954, c. 303, § 5, 68 Stat. 251.

§ 895. Management specialists; studies and reports; availability of funds; reimbursement of expenditures

The tribe is authorized to select and retain the services of qualified management specialists, including tax consultants, for the purpose of studying industrial programs on the Menominee Reservation and making such reports or recommendations, including appraisals of Menominee tribal property, as may be desired by the tribe, and to make other studies and reports as may be deemed necessary and desirable by the tribe in connection with the termination of Federal supervision as provided for hereinafter. Such reports shall be completed not later than February 1, 1959. Such specialists are to be retained under contracts entered into between them and authorized representatives of the tribe, subject to approval by the Secretary. Such amounts of Menominee tribal funds as may be required for this purpose shall be made available by the Secretary. In order to reimburse the tribe, in part, for expenditures of such tribal funds as the Secretary deems necessary for the purposes of carrying out the requirements of this section, there is authorized to be appropriated out of any money in the Treasury not otherwise appropriated, an amount equal to all of such expenditures incurred prior to July 2, 1958, plus one-half of such expenditures incurred thereafter, or the sum of $275,000, whichever is the lesser amount.

June 17, 1954, c. 303, § 6, 68 Stat. 251; July 14, 1956, c. 601, 70 Stat. 544; July 2, 1958, Pub. L. 85-488, § 1(a), 72 Stat. 290.

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891-902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the

Secretary or to submit to the Secretary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sections 891-902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. July 17, 1954, c. 303, § 7, 68 Stat. 251; July 14, 1956, c. 604, § 1, 70 Stat. 549; July 2, 1958, Pub. L. 85-488, § 1(b), 72 Stat. 290; Sept. 8, 1960, Pub. L. 86-733, § 1, 74 Stat. 867.

§ 897. Transfer of property

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of

this title, the title to all property, real and personal, held in trust by the United States for the tribe. The Secretary is directed to begin immediate negotiations with a private trustee of his choice to perfect a trust agreement so that if by March 1, 1961, the tribal corporation is not functioning, the Secretary will be prepared to transfer title to such property to said trustee as soon after March 1, 1961, as possible, but in no event later than April 30, 1961. The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits. June 17, 1954, c. 303, § 8, 68 Stat. 252; July 14, 1956, c. 604, § 2, 70 Stat. 550; July 2, 1958, Pub. L. 85-488, § 1(c), 72 Stat. 291; Sept. 8, 1960, Pub. L. 86-733, § 2, 74 Stat. 867.

§ 898. Taxes; initial exemption; taxes following distribution; valuation for income tax on gains or losses

No distribution, conveyance, or transfer of title to assets and no issuance or distribution of securities pursuant to the plan approved by the Secretary under the provisions of sections 891-902 of this title shall be subject to any Federal or State transfer, issuance, or income tax: *Provided,* That nothing contained in sections 891-902 of this title shall exempt the recipient of any cash distribution made hereunder from payment of income tax for the year in which the distribution is made on that portion of his share thereof which consists of interest on funds deposited in the Treasury of the United

States pursuant to the Supplemental Appropriation Act, 1952 (65 Stat. 736, 754). Following any distribution, conveyance, transfer, or issuance as aforesaid, the assets and securities which are held by, and any income derived therefrom which is received by or payable to, any person, or any corporation or organization as provided in section 897 of this title, shall be subject to the same taxes, State and Federal, as in the case of non-Indians, except that the basis of any valuation for purposes of Federal income tax on gains or losses shall be the value of the property on the date title is transferred by the United States pursuant to section 897 of this title. June 17, 1954, c. 303, § 9, 68 Stat. 252; Sept. 8, 1960, Pub. L. 86-733, § 3, 74 Stat. 867.

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. June 17, 1954, c. 303, § 10, 68 Stat. 252.

§ 900. Protection of minors, persons non compos mentis and other members needing assistance; guardians; other adequate means

Prior to the transfer pursuant to section 897 of this title, the Secretary shall protect the rights of members of the tribe who are less than eighteen years of age, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate. June 17, 1954, c. 303, § 11, 68 Stat. 252.

§ 901. Rules and regulations

The Secretary is authorized and directed to promulgate such rules and regulations as are necessary to effectuate the purposes of sections 891-902 of this title. June 17, 1954, c. 303, § 12, 68 Stat. 252.

§ 902. Contracts for completion of vocational or undergraduate college program

Notwithstanding any other provision of sections 891-902 of this title, the Secretary of the Interior is authorized to contract with the Wisconsin Department of Public Instruction, prior to the date for terminating Federal responsibilities, for the completion of a vocational or undergraduate college program of any member of the Menominee tribe who has been accepted for such program prior to the termination date. June 17, 1954, c. 303, § 14, as added Sept. 8, 1960, Pub. L. 86-733, § 4, 74 Stat. 867.

APPENDIX D

IN THE
UNITED STATES COURT OF CLAIMS

No. 134-67

[Filed April 25, 1967]

THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902;

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION

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NAtional 8-4400

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CHARLES A. HOBBS
Of Counsel

IN THE
UNITED STATES COURT OF CLAIMS

No. 134-67

THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902;

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION

1. ***Jurisdiction.*** Plaintiffs file this petition pursuant to 28 U.S.C. § 1505, and 28 U.S.C. § 1491.

2. ***Parties plaintiff.***

(a) ***Tribe.*** Plaintiff, the Menominee Tribe of Indians, is a recognized tribe of Indians which has existed since time immemorial, and which has always resided in the State of Wisconsin. As of 1954 it had 3,270 enrolled members; its members as of April 30, 1961 consisted of the enrolled members or their descendants.

(b) ***Corporation.*** Plaintiff, Menominee Enterprises, Inc., is a corporation incorporated under the laws of the State of Wisconsin pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The beneficial owners of all of the outstanding stock of Menominee Enterprises, Inc. are enrolled Menominee Indians, or their successors.

(c) ***Individuals.*** Plaintiffs, Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, are all enrolled members of the Menominee Tribe and stockholders of Menominee Enterprises, Inc.

(d) ***Trustee.*** Plaintiff, First Wisconsin Trust Company, is a trust company bank, incorporated under the laws of the State of Wisconsin, and is the trustee of a trust known as the Menominee Assistance Trust, whose beneficiaries are enrolled Menominee Indians who are either minors, *non compos mentis,* or persons deemed by the Secretary of the Interior to be in need of assistance in managing their affairs.

3. ***Previous Action on Claims.*** Except as stated herein, no action has been taken by Congress or any department

of the Government, or in any judicial proceeding, with respect to the claims herein set forth.

4. ***Menominee Reservation.*** The Menominee Reservations, where the Menominee Tribe and most of its members presently reside, was aboriginally owned by the Tribe, and was confirmed to the Tribe by the Treaty of Wolf River, May 12, 1854. 10 Stat. 1064. This reservation was never allotted, and remained wholly owned by the Tribe until conveyed in 1961 to Menominee Enterprises, Inc. by the Secretary of the Interior pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902.

5. ***Defendant's Fiduciary Obligation.*** From the time of the Louisiana Purchase until April 30, 1961, the United States held title to the Menominee Reservation and all other tribal properties and all rights incident thereto, holding and managing them for the benefit of the Menominee Tribe, and supervised the members of the tribe and their affairs. During such federal supervision over the property and members of the Menominee Tribe that is, until April 30, 1961, and for a reasonable transition period thereafter, the United States was subject to a high degree of fiduciary obligation to plaintiffs as to their property and property rights.

6. ***Menominee Forest – Restrictions.***

(a) On or about April 30, 1961, pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902, certain lands of the Menominee Reservation was conveyed to Menominee Enterprises, Inc., the corporate body of the Menominee Tribe, by the Secretary of the Interior, acting for and on behalf of the United States.

(b) Prior to the conveyance, the United States held the fee to the Reservation, in trust for the Menominee

Tribe. The Tribe owned the beneficial interest in the land and timber thereon, without any limitations other than those normally imposed on Indian trust property; and specifically, there was no limitation requiring that the timber be managed in accordance with principles of sustained yield.

(c) At the time of the conveyance, and in accordance with 25 U.S.C. § 896, the United States caused covenants or restrictions requiring sustained yield management and prohibiting alienation or encumbrance of the lands for a period of thirty years from April 26, 1961.

(d) Plaintiffs were entitled to a conveyance of the fee simple absolute without sustained yield or any other restriction, or else to be paid just compensation for the diminution in the value of the title.

(e) As a result of the sustained yield restriction, the value of the plaintiffs' reservation forests and of the plaintiffs' timber marketing business immediately diminished greatly in that under the sustained yield restriction, certain efficient practices cannot be followed, and certain inefficient practices must be followed.

(f) Plaintiffs have suffered losses due to the sustained yield and alienation restrictions.

7. ***Menominee Forest—Management.*** Prior to April 30, 1961, defendant was under an obligation to properly manage, cut and market the timber in the Menominee Forest. The defendant negligently failed to cut certain stands of timber during periods when their commercial value was at a peak; failed to replant new trees in accordance with sound forestry practices thus failing to maintain adequate reforestation; failed to cut adequate timber in order to prevent loss from over-maturity,

insect infestation and other diseases; and otherwise failed to care for and manage the Menominee Forest in accordance with sound forestry practices, all to the damage of plaintiffs.

8. ***Menominee Mill.***

(a) Prior to April 30, 1961, the Menominee Mill at Neopit, Wisconsin, was owned by the defendant, as trustee for the Menominee Tribe, and defendant was responsible for its management and maintenance. On that date, pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902, the mill was conveyed to Menominee Enterprises, Inc., by the Secretary of the Interior, acting for and on behalf of the United States.

(b) Prior to April 30, 1961, the defendant negligently failed to maintain the minimum safety standards necessary to operate the mill. After the mill was conveyed to Menominee Enterprises, Inc., the State of Wisconsin Industrial Commission inspected the mill and noted over 100 violations of the State safety codes. Plaintiffs were required to comply with the State of Wisconsin safety codes and remedy the safety violations resulting from the mismanagement of the defendant and its failure to properly maintain the mill under minimum acceptable safety standards, at a considerable cost to plaintiffs.

(c) The United States also negligently failed to adequately maintain the mill, to replace obsolete equipment and machinery, to make changes, modernize and install new and required equipment necessary to permit the mill to operate on a profitable basis. As a result, plaintiffs, after they took over the management of their mill, were required to incur great costs in order to modernize the mill and put it on a profitable basis; and

plaintiffs further suffered damages for the loss of production and loss of efficiency occasioned during the modernization period.

9. ***Highway Rights-of-Way.*** On April 30, 1961, defendant deeded approximately 1,606 acres, more or less, of the Menominee Reservation to the State of Wisconsin for use as state, county and town roads. The State of Wisconsin deeded approximately 525 acres, more or less, of this land to Menominee County for use as county roads and approximately 627 acres, more or less, to the Town of Menominee for use as town roads, keeping the remainder of approximately 453 acres, more or less, for use as state roads, consisting of nonforest and forest lands as follows (acres):

	State	*County*	*Town*	*Totals*
Nonforest Land	66.27	33.91	60.86	161.04
Forest Land	387.20	490.97	566.49	1,444.66
Totals	453.47	524.88	627.35	1,605.70

Plaintiffs have never been compensated for said lands deeded to the State of Wisconsin, much of which contained valuable commercial timber.

10. ***Power Line Right-of-Way.*** Prior to April 30, 1961, defendant as trustee for plaintiffs, entered into a contract with Wisconsin Power and Light for the extension of power lines through the Menominee Reservation. The right-of-way was approximately 22 miles long and 60 feet wide, for which plaintiffs received no compensation. Said agreement was unfair and should not have been approved by the defendant. As a result of the defendant's negligence in approving said agreement and granting the right-of-way, plaintiffs have suffered damages.

11. ***Public Sewerage System.*** Prior to April 30, 1961, defendant negligently installed sewer pipes of an inadequate diameter which did not meet the standards as established by the State of Wisconsin. When plaintiffs took over the management of their reservation, they were required to install new pipes to meet the State standards. The Town of Menominee has received a grant from the defendant (The Nelson-Laird Bill, P.L. 89-653) to replace the sewer system so as to conform with the State requirements. Plaintiffs have suffered damages as a result of defendant's negligence in its installation of inadequate sewer pipes or failure to install proper sewer pipes.

12. ***Soo Line Right-of-Way.*** During federal supervision over the property and members of the Menominee Indian Tribe, the defendant deeded twelve miles of rail right-of-way in Menominee County, 100 feet wide now used by the Soo Line Railroad Company. Plaintiffs were compensated less than $7,000 for this right-of-way, which was grossly inadequate. Defendant, as trustee, was under a duty to insure that plaintiffs would be fairly compensated. Defendant has failed to take any action whatsoever to compensate plaintiffs, and plaintiffs therefore have suffered damages resulting from defendant's negligence.

13. ***Termination Expenses.*** During the period June 17, 1954 to April 30, 1961, when the United States was in the process of terminating its federal supervision over the property and members of the Menominee Tribe, certain expenditures were incurred for items such as management specialists, tax consultants, industrial program studies, various reports and recommendations, appraisals, and other items necessary to carry out the

requirements of the Menominee Termination Act. Pursuant to section 6 of the Act (25 U.S.C. § 895), a portion of these expenditures were reimbursed to plaintiffs. Since termination actually benefited the defendant since it was relieved of duties and obligations owing to plaintiffs, defendant was obligated to bear all the expenses of termination and plaintiffs are entitled to complete reimbursement, including interest.

14. ***Mismanagement of Tribal Funds and Property.***

(a) During federal supervision over the property and members of the Menominee Indian Tribe, the books of account and other records pertaining to all moneys and financial transactions of and for plaintiffs and the books of account and other records pertaining to property and transactions therein other than moneys have been in the exclusive possession and control of defendant. Proceeds of property of plaintiffs or of rents or other income therefrom have been payable to or collected by defendant, and by it dealt with and disposed of, including, without limitation, moneys payable under:

Act of January 9, 1837, c. 1, § 1, 5 Stat. 135, and Sec. 2093 of the Revised Statutes (25 U.S.C. § 152);

Act of April 1, 1880, c. 41, 21 Stat. 70 (25 U.S.C. § 161);

Act of March 3, 1883, c. 141, § 1, 22 Stat. 582, 590 (25 U.S.C. § 155);

Act of February 28, 1891, c. 383, § 3, 26 Stat. 794, 795 (25 U.S.C. § 397);

Act of March 2, 1899, c. 374, §§ 1-3, 30 Stat. 990, as amended (25 U.S.C. § 312);

Act of May 17, 1900, c. 479, § 1, 31 Stat. 179 (43 U.S.C. § 179);

Act of March 3, 1901, c. 832, § 3, 31 Stat. 1058, 1083 (25 U.S.C. § 319);

Act of March 11, 1904, c. 505, §§ 1-2, 33 Stat. 65, as amended (25 U.S.C. § 321);

Act of March 3, 1909, c. 263, 35 Stat. 781, as amended (25 U.S.C. § 320);

Act of June 25, 1910, c. 431, § 7, 36 Stat. 855, 857 (25 U.S.C. § 407);

Act of March 4, 1913, c. 165, § 1, 37 Stat. 1015, as amended (16 U.S.C. § 614);

Act of March 4, 1913, c. 165, § 2, 37 Stat. 1015, 1016 as amended (16 U.S.C. § 615);

Act of February 27, 1917, c. 133, § 4, 39 Stat. 944, 945 (30 U.S.C. § 86);

Act of June 30, 1919, c. 4, § 26, 41 Stat. 3, 31, as amended (25 U.S.C. § 399);

Act of June 10, 1920, c. 285, § 17, 41 Stat. 1063, 1072 (16 U.S.C. § 810);

Act of April 12, 1924, c. 93, 43 Stat. 93, as amended (25 U.S.C. § 190);

Act of May 29, 1924, c. 210, 43 Stat. 244 (25 U.S.C. § 398);

Act of April 17, 1926, c. 156, 44 Stat. 300 (25 U.S.C. § 400a);

Act of March 3, 1927, c. 299, § 2, 44 Stat. 1347 (25 U.S.C. § 398b);

Act of May 11, 1938, c. 198, § 2, 52 Stat. 347 (25 U.S.C. § 396b);

Act of June 17, 1954, c. 303, 68 Stat. 250, as amended (25 U.S.C. §§ 891-902).

(b) At all times referred to herein, defendant has been under a duty to pay interest on funds of plaintiffs in accordance with the provisions of law, including, without limitation, the provisions of the following statutes:

Act of January 9, 1837, c. 1, § 3, 5 Stat. 135, and R.S. § 2095 (25 U.S.C. § 157);

Act of January 9, 1837, c. 1, § 4, 5 Stat. 135, and R.S. § 2096 (25 U.S.C. § 158);

Act of September 11, 1851, c. 25, § 2, 5 Stat. 465, and R.S. 3659 (31 U.S.C. § 547a);

Act of June 10, 1876, c. 122, 19 Stat. 58 (25 U.S.C. § 160);

Act of April 1, 1880, c. 41, 21 Stat. 70 (25 U.S.C. § 161);

Act of June 24, 1938, c. 648, § 1, 52 Stat. 1037 (25 U.S.C. § 162a);

Act of February 12, 1929, c. 178, 45 Stat. 1164, as amended (25 U.S.C. § 161a);

Act of February 12, 1929, c. 178, § 2, as amended, 46 Stat. 584 (25 U.S.C. § 161b);

Act of February 12, 1929, c. 178, § 4, as amended, 46 Stat. 584 (25 U.S.C. § 161d).

(c) Alternatively, defendant has at all times been under a duty to pay to or for the account and behalf of plaintiffs interest on any and all sums of plaintiffs' money in the hands of defendant which it retained for its own uses and purposes, whether by way of interest or principal.

(d) Alternatively, defendant at all times has been under a duty, in paying out moneys of plaintiffs held

by it or invested by it, to pay any sum or sums from the least productive funds or property of plaintiffs before proceeding to pay money from funds or property of greater productivity.

(e) At all times referred to herein, defendant has been under a duty as guardian and trustee of plaintiffs and the property of plaintiffs promptly and providently to invest funds of plaintiffs coming into the hands of defendant and to reinvest the same, and any rents, issues or profits thereof.

(f) Upon information and belief, plaintiffs allege that defendant from time to time has collected or received, or in the exercise of its fiduciary duties ought to have collected or received, various property, including money, for or on behalf of plaintiffs, or defendant itself has become liable to pay moneys to or for or on behalf of plaintiffs. Defendant has failed to account for its management, handling and disposition of the said moneys and properties. As a result, plaintiffs have been damaged by having been deprived of the amount of money or value of other property, together with interest thereon, which may be shown to be owing to plaintiffs upon a proper accounting in accordance with the fiduciary duties and the liabilities herein set forth.

WHEREFORE, plaintiffs pray that judgment be entered against the defendant in an amount which will provide just compensation under the Fifth Amendment to the Constitution and other applicable laws, including damages for delay in payment, for plaintiffs' property and interests in property taken or disposed of by the defendant; and for damages incurred by plaintiffs due to defendant's negligence hereinbefore set out and for defendant's mismanagement of plaintiffs' funds and

property; and for such other and further relief as to the Court may appear just and equitable.

/s/ _____

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WILKINSON, CRAGUN & BARKER
CHARLES A. HOBBS
Of Counsel

APPENDIX E

IN THE
UNITED STATES COURT OF CLAIMS

No. 134-67

(Filed March 16, 1971)

THE MENOMINEE TRIBE OF INDIANS, *et al.*

v.

THE UNITED STATES

MEMORANDUM OF PRETRIAL CONFERENCE

A pretrial conference in the above captioned case was held in the office of the undersigned beginning at 10 A.M. on March 11, 1971. Present were the following:

For the Plaintiff:

Angelo A. Iadarola, Esq.
Frances L. Horn, Esq.

For the Defendant:

Bernard M. Newburg, Esq.

Commissioner:

Louis Spector

This pretrial conference was originally scheduled for March 4 at 10 A.M. On that morning it was required to be cancelled and it was later scheduled for March 11,

1971, at the request of defendant's counsel. This postponement was followed by a letter of March 5, 1971 from plaintiff's counsel expressing great distress at the cancellation of the March 4th conference and fear that the trial date of September 14, 1971 might be delayed as a result of this and other delays which have occurred in the case. At the first pretrial conference conducted by the undersigned, May 4, 1969, pretrial arrangements were concluded which contemplated completion of pretrial by March 1, 1970, following which the remaining issues were to be set for trial. By reason of slippage in this schedule and discovery proceedings, pretrial responses were not completed until approximately a year later, in March 1971.

At a pretrial conference on August 13, 1970, it was then ordered:

> Defendant's response to plaintiff's pretrial statement, presently due September 15, 1970, will be furnished November 15, 1970. This is the third extension granted and no further extensions will be allowed except for extraordinary circumstances.
>
> It was concluded that a trial date should be established for this case in order that the parties may have a definite target on which future planning could be predicated. Trial of the issues remaining to be tried *will commence September 14, 1971, whether or not pretrial proceedings have been concluded by that date.* [Emphasis supplied.]

At this pretrial conference, the following understandings were reached and IT IS SO ORDERED:

1. Defendant's request for an extension of the trial date to January 1972 was rejected. Counsel were given 24 hours to agree on a mutually satisfactory date for the commencement of the trial of the remaining issues in

this case sufficiently before the Christmas holidays to permit completion of the trial without interference with those holidays. In accordance with that order, counsel provided the date of December 1, 1971 for commencement of trial, and defendant's counsel will furnish a letter to the undersigned acknowledging the trial will be commenced on that date.

2. Without objection, plaintiff's exhibits Nos. 1 through 406, and defendant's exhibits Nos. 1 through 23 were admitted into evidence subject to the following: Defendant's exhibit No. 22 is currently missing and it is received in evidence without objection if produced as described in defendant's pretrial response at page 88. Further, both counsel reserved the right to reorganize their exhibits more efficiently for use at the trial, and following the trial, including the right to remove some of them with the option of the other party to resubmit them. As a result, the exhibits will not physically be received in evidence until that reorganization, as above described, has been completed.

3. Joint exhibits will be prepared on the subject of the legislative history and be submitted in the interim.

4. Both parties anticipate that there will be additional documentary evidence and that it will be submitted within the next 30 days.

5. In the course of this pretrial conference, counsel agreed upon a partial stipulation of facts which will be drafted by them, and which is attached hereto as Appendix No. 1.

6. Counsel will agree upon a list of the issues remaining to be tried at the trial scheduled to begin December 1, 1971, and this list of issues (including a reference to a matter heretofore severed for separate trial), is annexed hereto as Appendix No. 2.

Louis Spector
Commissioner

IN THE
UNITED STATES COURT OF CLAIMS

Docket No. 134-67

MENOMINEE TRIBE OF INDIANS, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

APPENDIX NO. 2

I. Issues To Be Tried on December 1, 1971

1. Plaintiffs' claim for damages due to the restrictions on the Menominee Forest and/or other lands within the reservation.

2. Plaintiffs' claim for damages due to the government's mismanagement of the Menominee Forest.

3. Plaintiffs' claim for damages due to the government's mismanagement of the Menominee Mill.

4. Plaintiffs' claim for highway rights-of-way deeded by the defendant to the State of Wisconsin, for which plaintiffs were never compensated.

5. Plaintiffs' claim for reimbursement of termination expenses.

6. Plaintiffs' claim for damages suffered for the Tribe's loss of its exemption from taxation.

II. The Following Claims Will Be Tried at a Later Date with Plaintiffs' Claim for Mismanagement of Tribal Funds and Properties (Paragraph 14 of Petition) Which Has Been Severed

1. Plaintiffs' "Power Line Right-of-Way" claim.
2. Plaintiffs' "Public Sewerage System" claim.
3. Plaintiffs' "Soo Line Right-of-Way" claim.

III. A Trial Date for Claims and Issues Not Tried on December 1, 1971

It has been agreed by the parties and the Commissioner that all issues and claims not tried on December 1, 1971 (listed above), are tentatively set for May 15, 1972. The parties agree to advise the Commissioner on December 1, 1971, whether the May 15, 1972, trial date is realistic; and if not, a new date will be scheduled at that time.

IV. Reports of Experts To Be Submitted into Evidence

It has been agreed between the parties and the Commissioner that all reports prepared by the experts which are to be submitted in evidence will be exchanged between the parties no later than 30 days prior to the trial date. For the December 1, 1971, trial, the reports of the experts will be exchanged between the parties on November 1, 1971.

/s/ Angelo A. Iadarola
Attorney of Record for Plaintiffs

/s/ Bernard M. Newburg
Attorney for the Defendant

APPENDIX F

IN THE
UNITED STATES COURT OF CLAIMS

Docket No. 134-67

[Filed January 31, 1975]

MENOMINEE TRIBE OF INDIANS, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

RESPONSE TO THE MOTION OF PLAINTIFFS TO AMEND THE FIRST AMENDED PETITION

Comes now the defendant and in response to the motion of plaintiffs to amend the First Amended Petition, and to sever the claims, states:

1. Plaintiffs' motion is untimely in that it comes more than three years after the trial of most of the causes pled.

2. The granting of plaintiffs' motion will cause undue delay because if granted, the defendant is entitled to "an opportunity to meet such evidence," (Rule 39(b)) as may be the basis of the amendment.

3. It was error to admit any evidence of post-1961 damages over the objections of the defendant. (TR-154).

4. Objections to the materiality of all exhibits were reserved to the briefing stage of the litigation. (TR-14, TR-16, TR-364-366). Objections were made through defendant's findings to the evidence of alleged post-termination damages as not material to the issues pled.

5. The proposed amendment to the Forest Management Claim (proposed Docket No. 134-67B) to assert damages post-termination (post-1961) is barred and is beyond the jurisdiction of the Court as expressly limited by 25 U.S.C. § 896 which states: "* * * No Court shall construe the sustained yield requirement of this act by any court to impose liability on the United States."

6. The statute of limitations bars liability for any claim of liability arising prior to April 25, 1961, (28 U.S.C. § 2501), which states: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition is filed within the six years after such claim first accrues."

7. The allegations found in paragraph 6(c) and 6(h) are not based upon any proof in the record. The Court can take judicial notice that 25 U.S.C. § 896 contains no prohibition against alienation or encumbrance of lands for a period of 30 years from April 26, 1961.

8. There is no proof, other than the totally unsupported allegation of Dr. Vern Ray that the United States owed any duty not to terminate the Menominee Tribe or that they were unprepared to take over mill and forest management upon termination. There is no proof that the only party responsible for management, i.e. Menominee Enterprises, Inc. was unprepared to take over management of the mill or forest. The allegations of Dr. Vern Ray are entitled to no more weight as evidence

than the unsupported allegations of attorneys, contained in the proposed second amended petition.

8a. The allegations of premature termination and unpreparedness for management are superfluous since the claims for post-termination damages are premised upon totally different theories of liability, i.e. pre-termination mismanagement. The pre-termination claims, and damages premised upon them are barred by the statute of limitations.

9. The claims of taking set out in paragraph 6 of 134-67D is not based upon evidence, it is simply an attempt to change the legal theory.

10. No useful purpose is to be served by severing the claims at this point. Plaintiffs can point to no logical reason for severance at this point in time.

11. The motion to amend to conform to the proof should be denied for the reason that plaintiffs have cited no evidence to support any of their assertions that the proposed amendment will conform to the evidence.

12. Amendment of the petitions to allege claims three years after trial will cause extreme prejudice to the defendant. If permitted the record should be re-opened to permit defendant to present proof upon post-termination claims.

Dated this day of January, 1975.

Respectfully submitted,

WALLACE H. JOHNSON
Assistant Attorney General

RICHARD L. BEAL
Attorney

Attorneys for Defendant

By: _____
Attorney

APPENDIX G

IN THE
UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 134-67

(Filed February 18, 1975)

THE MENOMINEE TRIBE OF INDIANS, *et al.*

v.

THE UNITED STATES

ORDER ON PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE FIRST AMENDED PETITION (RULE 39(b))

Rule 39(b), under which this motion is brought, permits amendments to the pleadings "as may be necessary to cause them to conform to the evidence * * * at any time, *even after judgment*; but failure so to amend does not affect the result of the trial of these issues." (Emphasis supplied.) Similarly Rule 39(a) permits a party to amend his pleading by leave of court "(which shall be freely given when justice so requires)."

The first purpose of plaintiffs' motion is to amend its prior pleading to conform to the evidence presented at the trials held in December 1971 and May 1972 on nine

of the ten separate claims involved. Trial of the tenth claim has been deferred. There can be no valid objection to this first purpose since the Rule itself states that "failure so to amend does not affect the result of the trial of these issues," and it is in accord with good standard practice. In any event, the procedure for amending pleadings to conform to the proof was discussed and endorsed at trial, and reflected in the transcript. Moreover, memorandum of posttrial conference, November 17, 1972, states that: "Counsel were advised that they would be afforded an opportunity to amend pleadings to conform to the proof. * * * It is contemplated that this will be accomplished in the form of a motion to amend the petition to conform to the proof."

As a second purpose, plaintiffs' motion notes that amendment will serve also to accomplish the purpose of the court's order of May 21, 1973, to sever the several claims into nine separate dockets.[1] This is also a valid and beneficial purpose of the proposed amendment, since it serves to organize plaintiffs' allegations to conform with the proposed findings and briefs, and promotes understanding of those allegations to the benefit of both parties, and the court.

Defendant offers no valid reason for opposing the motion. Its response is largely argument on the merits of the claims, merits which have already been argued at great length in proposed findings and briefs filed after proof was closed June 15, 1972. Defendant's objections misconceive the purpose of pleadings; which are comprised of allegations and the theories of the parties—not

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[1]One of the claims is the subject of a separate stipulation of the parties to dismiss it voluntarily.

proof. These cases will be decided on the evidence of record and the applicable law, not upon the pleadings.

Defendant also misconceives the purport of Rule 39(b), and the distinction between pleadings and proof, when it suggests that it should now be afforded an opportunity to present evidence on matters presented by plaintiffs at trial, if plaintiffs are permitted to amend their pleading to conform to the proof. The opportunity referred to in the Rule is mentioned after the following sentence:

> * * * If evidence is objected to *at the trial* on the ground that it is not within the issues made by the pleadings, the court may receive the evidence and may allow the pleadings to be amended, *and shall do so freely* when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits. The court shall afford the objecting party an opportunity to meet such evidence. [Emphasis supplied.]

The opportunity referred to is obviously one at trial, or at a continuation of the trial; and defendant was afforded that opportunity. Moreover, the evidence presented by plaintiffs at trial was no surprise to defendant. It was contained in reports of expert witnesses exchanged at least 30 days prior to the *first* trial, and defendant was satisfied then to rely on cross-examination of that testimony. Moreover, no mention has been made of the need "to meet such evidence," in the past 3 years. Instead, the parties have, and quite properly, argued

from that evidence and the record in their proposed findings and briefs.[2]

One thing is clear. Plaintiffs are entitled at any time under the Rule to amend their pleading to conform to the proof. In this case, the amendment was in fact discussed at trial when the proof was being offered. Reiterating that cases are decided on proof, not pleadings, defendant's objections are found to be groundless, and plaintiffs' motion to amend is allowed.[3]

/s/ Louis Spector
Trial Judge

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[2]*See & cf. Cohen Sons & Co. v. Koch*, 376 F.2d 629 (1st Cir. 1967); and *Murray v. Blatchford*, 307 F. Supp. 1038, 1043 (D.R.I. 1969).

[3]*See & cf. J. L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 412 F.2d 1360 (1969); *Deakyne v. Commissioners of Lewes*, 416 F.2d 290 (3d Cir. 1969); and *Standard Ins. Co. v. Pittsburgh Elec. Insulation, Inc.*, 29 F.R.D. 185 (W.D. Pa. 1961).